

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 32889-5-II

Respondent,

v.

LAWRENCE EDWARD CALLOWAY,

UNPUBLISHED OPINION

Armstrong, J. -- Lawrence Edward Calloway appeals his conviction for a felony violation of a domestic violence no contact order. He argues that the State violated his Fifth Amendment rights by using evidence of his post-arrest silence against him as substantive evidence of his guilt and that the evidence was insufficient to support the conviction.¹ Because the evidence of Calloway's post-arrest silence was error and this error was not harmless, we reverse and remand.

FACTS

On November 25, 2003, the Thurston County District Court issued a domestic violence no contact order prohibiting Calloway from contacting his wife Arleatha Calloway.² The no contact order expired November 25, 2005.

¹ In his pro se statement of additional grounds for review, RAP 10.10, Calloway also argues that he received ineffective assistance of counsel and, arguably, that the trial court erred in denying his motion to substitute counsel. Because we reverse and remand on other grounds and these same errors are unlikely to reoccur on remand, we do not address these issues.

² The no contact order also prohibited Calloway from contact with his wife's residence. Although the record clearly shows that Calloway was found at Arleatha's residence, the to convict instruction required that the jury find Calloway had willful contact with his wife and did not mention the residence restriction. Accordingly, the residence restriction is not at issue.

In October 2004, Calloway was under supervision by the Department of Corrections; his Community Corrections Officer (CCO) was Mindy Merrill. Soon after their initial contact, CCO Merrill began to suspect that Calloway was living at his wife's house in Olympia in violation of the no contact order; she contacted CCO Matt Frank in Thurston County and asked him to investigate.

On October 28, CCO Frank and CCO Joe Vanbuskirk went to Arleatha's house to investigate. They saw Calloway and another person leave the house and drive to an employment agency.

The next day, after CCO Frank called the employment agency and verified that the man they had followed was Calloway, CCOs Frank and Vanbuskirk, accompanied by deputies from the Thurston County Sheriff's Department returned to Arleatha's house and knocked on the door. Calloway answered the door wearing a bathrobe and slippers. The deputies immediately took Calloway into custody and placed him in handcuffs.

At this point, several children and two adult women approached the doorway. One of the deputies, Deputy Eugene Duprey, later testified that the younger of the two women, who was upset that Calloway was being arrested, identified herself as Cheryl K. Struthers and stated that her birth date was February 14, 1965. Deputy Duprey "did a check via [his] radio" and was informed there was no record of such a person. Report of Proceedings (RP) (Feb. 15, 2005) at 68. When Deputy Duprey attempted to get more information from the woman, she shut the door. None of the other people in the house identified themselves. After leaving the residence, Deputy Duprey learned from a copy of Arleatha's driver's license photograph that the woman he had spoken to at the house was Arleatha.

Because Calloway had two prior

convictions for violating no contact orders, the State charged him with felony violation of a domestic violence no contact order.³ Calloway pleaded not guilty, and the case proceeded to a jury trial.

At trial, the court admitted the copy of Arleatha's license into evidence, and Deputy Duprey confirmed that the woman in the photograph appeared to be the same woman he contacted at the Olympia residence. The court also admitted a certified copy of the November 25, 2003 no contact order prohibiting Calloway from contacting Arleatha.

During Deputy Duprey's testimony on direct, the following exchange occurred:

Q [Prosecutor] Now, did any of the other individuals within the household identify themselves?

A [Deputy Duprey] They were all reluctant to cooperate. They were pretty upset that Mr. Calloway was under arrest. Things were starting to escalate. So at that point we figured it would be better to step back and let things cool down.

Q. And did Mr. Calloway identify any of the individuals for you?

A. *I went and talked to him, advised him of his rights, and he declined to talk.*

RP (Feb. 15, 2005) at 68-69 (emphasis added).⁴

The State also called Arleatha. She admitted that Calloway was living at her Olympia residence when he was arrested, but she denied being at the residence when he was there or having any contact with Deputy Duprey or any of the CCOs. Instead, she asserted that while Calloway was at her house she was staying at her sister's house in Kent. In addition, she testified that even though she had been called as a witness for the State, she was there to testify for her husband, she still had feelings for him, and she still wanted to live with him. Calloway did not call

³ The State later amended the charges to include an additional charge of harassment based on threats Calloway allegedly made to CCO Frank after the arrest. The jury found Calloway not guilty of the harassment charge and that charge is not at issue on appeal.

⁴ Defense counsel did not object to this testimony.

any witnesses.

In closing argument, the prosecutor did not refer directly to the fact that Calloway invoked his *Miranda*⁵ rights when Deputy Duprey questioned him. She did, however, argue that no one at the scene would assist Deputy Duprey in identifying the younger woman because the woman was in fact Arleatha:

Now, Ms. Calloway testified that she wasn't there. The difficulty with her testimony is, remember what Deputy DuPrey stated. First of all, he identified the female as her. *Second, as part of his investigation, he had asked, who are you, or at least tell me who else is in the house. Now, no one would assist him. And why not? Why wouldn't they help him identify that female that was asking why you are arresting Mr. Calloway. The reason is because it was Arleatha Calloway.* She was there. And Mr. Calloway was residing at her residence in violation of the No Contact Order.

...

With regard to the violation of the No Contact Order, we have a difference in testimony. We have Deputy DuPrey who places Ms. Calloway there, and she has said that she's at her sister's. Recall what Ms. Calloway said. She still cares about her husband, and she wants to be with him.

The State would submit that she was there that day. Deputy DuPrey identified her. *The reason no one would help him at that time when he was investigating was because Ms. Calloway was there,* and so was Mr. Calloway, in violation of the order.

RP (Feb. 16, 2005) at 191-92, 196 (emphasis added).⁶

The jury convicted Calloway on the felony violation of a domestic violence no contact order charge.

ANALYSIS

I. Comment on Defendant's Silence

⁵ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁶ Defense counsel did not object to this argument.

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We first address whether Deputy Duprey's testimony that Calloway invoked his *Miranda* rights and declined to talk to him when he was attempting to identify the people in the house was

an impermissible comment on Calloway's exercise of his constitutional right to remain silent and, if so, whether the error was harmless. Although Calloway did not object to this testimony, he may raise this issue on appeal because it is a manifest error affecting a constitutional right. *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274 (2002); *State v. Nemitz*, 105 Wn. App. 205, 214, 19 P.3d 480 (2001); *State v. Rogers*, 70 Wn. App. 626, 630, 855 P.2d 294 (1993)).

The Fifth and Fourteenth Amendments and article I, section 9 of the Washington State Constitution, protect a defendant's right against self-incrimination. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). "In the postarrest context, it is well-settled that it is a violation of due process for the State to comment upon or otherwise exploit a defendant's exercise of his right to remain silent." *Romero*, 113 Wn. App. at 786-87 (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979)). In essence, a police witness may not comment on the defendant's silence in a way that infers guilt from the defendant's refusal to answer questions. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). If the State does comment on the defendant's right to remain silent, we must reverse unless the State meets its burden of proving the error harmless. *Easter*, 130 Wn.2d at 242.

Because Deputy Duprey testified that Calloway invoked his *Miranda* rights and declined to talk to him, the testimony at issue here is a direct comment on Calloway's silence. See *Romero*, 113 Wn. App. at 791. Furthermore, given the context of the testimony and the prosecutor's closing argument, we cannot say that the State did not exploit Calloway's exercise of his right to remain silent.

Deputy Duprey referred to Calloway's

post-*Miranda* silence in response to the prosecutor's question about whether Calloway helped the deputy identify the people at the house. Although the prosecutor did not refer directly to Calloway's silence in closing argument, she argued that the fact no one at the house cooperated with Deputy Duprey was evidence that the woman was in fact Arleatha. In effect, the prosecutor's argument allowed the jury to infer that Calloway's refusal to tell Deputy Duprey that the woman was not Arleatha at this point was substantive evidence that the woman was Arleatha and that his defense was fabricated. Thus, Deputy Duprey's testimony, combined with the prosecutor's argument, introduced Calloway's post-arrest silence as substantive evidence of guilt. Accordingly, we turn to the issue of whether this error was harmless. Such an error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *State v. Keene*, 86 Wn. App. 589, 594, 938 P.2d 839 (1997).

Although no one disputes that Calloway was at Arleatha's house, there is conflicting evidence as to whether Arleatha was present at the same time. Deputy Duprey's identification, coupled with the fact the jury was able to compare Arleatha's license photograph to her in person, is strong evidence that she was at the house when Calloway was arrested. But Arleatha's testimony contradicted Deputy Duprey's testimony. As a result, the issue of Calloway's guilt ultimately rested on the jury's credibility determinations. This may, as discussed below, be sufficient evidence to support the conviction, but we cannot say that it is so overwhelming that it necessarily leads to a finding of guilt. Accordingly, we must reverse Calloway's conviction.

We next turn to Calloway's sufficiency argument to determine whether the case must be remanded for a new trial or whether the charge must be dismissed. *See State v. Prestegard*, 108 Wn. App. 14, 22 n.5, 28 P.3d 817 (2001) (citing

State v. Hescok, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999)).

II. Sufficiency

Calloway argues that the evidence was insufficient to show that he had contact with his wife because she denied being present at the house and the only evidence of her presence was the deputy's identification based on the driver's license photograph. We disagree.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003) (citations omitted). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citations omitted). Circumstantial evidence is as reliable as direct evidence, *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), and we defer to the trier of fact regarding a witness's credibility or conflicting testimony. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citations omitted).

Under the jury instructions, the State had to prove that Calloway had contact with Arleatha. Although Arleatha denied being at the house in Olympia when Calloway was there, Deputy Duprey identified Arleatha from her driver's license photograph and the jury could compare the photograph to Arleatha in person. Based on this evidence, the jury determined that the woman Deputy Duprey contacted was Arleatha. In doing so, the jury implicitly found Arleatha not credible, a decision we do not review. *Camarillo*, 115 Wn.2d at 71. Deputy Duprey's identification, supported by the driver's license photograph, was sufficient to allow a rational jury to determine beyond a reasonable doubt that Arleatha was at the house when

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Calloway was arrested.

Accordingly, we reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

I concur:

Penoyar, J.

QUINN-BRINTNALL, C.J. (dissenting) — At trial the defense did not object to Deputy Duprey’s testimony that all those present at the house during the arrest, including Calloway, declined to identify the woman. Likewise, the defense did not object to statements in the deputy prosecutor’s closing argument. For the reasons I set out in *State v. Kirkman*, 126 Wn. App. 97, 107 P.3d 133 (2005), the defendant has failed to properly preserve these issues and thus we should not review them.

In addition, Deputy Duprey positively identified the woman he saw at the house when he arrested Calloway as Arleatha Calloway. Arleatha Calloway denied that she was at the house that night, but she testified that the driver’s license photo Deputy Duprey used to identify her was her driver’s license. Moreover, unlike the members of this court, the jurors saw Arleatha Calloway. They know whether she is particularly memorable in appearance and are in the best position to judge the similarity between her appearance when she testified and the driver’s license photo.

From my review of the record, the jury’s verdict rests on untainted evidence, independent of that belatedly complained of on appeal and we should not substitute our judgment for the jury’s. Therefore, I respectfully dissent.

QUINN-BRINTNALL, C.J.